No. 92-1205

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

AUNYX CORPORATION and AUNYX BUSINESS MACHINES CORPORATION,

Petitioners,

vs.

CANON U.S.A., INCORPORATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. May the petitioners obtain review by this Court of the *res judicata* dismissal of one of their antitrust claims on the ground that the International Trade Commission lacked subject matter jurisdiction to adjudicate such claim where (a) the petitioners invoked the Commission's jurisdiction to hear their antitrust claims; and (b) the petitioners did not challenge the Commission's jurisdiction to hear antitrust-based claims either on appeal to the Federal Circuit from the Commission's determination adverse to the petitioners, or on appeal to the First Circuit from the District Court's successive dismissals of the petitioners' other antitrust claims?

2. Where the parties fully litigated the market impact and competitive effect of the respondent's marketing restrictions in a prior adjudicative proceeding initiated by the petitioners before the International Trade Commission, and such restrictions were analyzed under the rule of reason and found to promote interbrand competition and not unreasonably restrain trade, were the petitioners later precluded from asserting in another proceeding that the same conduct was a *per se* unreasonable restraint of trade?

3. Did the District Court properly direct a verdict upon the petitioners' horizontal conspiracy claim for failure to prove "antitrust injury" where (a) the challenged conduct was found to be pro-competitive in a prior antitrust-based adjudicative proceeding, and (b) the petitioners declined to introduce proof that they were injured by a competition-reducing effect of the respondent's conduct?

CORPORATE DISCLOSURE STATEMENT

Respondent, Canon U.S.A., Inc., pursuant to Supreme Court Rule 29.1, states that it is a New York corporation and a wholly-owned subsidiary of Canon Inc., a Japanese corporation. Respondent further states that it has the following subsidiaries: Ambassador Office Equipment, Inc., an Illinois corporation; Astro Office Products, Inc., a California corporation; Canon Business Machines, Inc., a California corporation; Canon Computer Systems, Inc., a California corporation; Canon Financial Services, Inc., a New Jersey corporation; Canon Information Systems, Inc., a California corporation; Canon Research Center America, Inc., a California corporation; Canon Software America, Inc., a New York corporation; Canon Trading U.S.A., Inc., a California corporation; Canon Virginia, Inc., a Virginia corporation; Dupli-Fax, Inc., a New Jersey corporation; and MCS Business Machines, Inc., a New York corporation.

TABLE OF CONTENTS

	Page
Questions Presented	i
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Authorities	vi
Statement of the Case	1
A. Background	1
B. The ITC Section 337 Proceeding	3
C. The District Court Action	7
Reasons for Denying the Writ	9
I. Aunyx Is Precluded From Maintaining That The ITC Lacked Jurisdiction To Hear Claims Cognizable Under The Federal Antitrust Laws Or That The ITC Determination Is Not Entitled To *Res Judicata* Effect.	9
A. The Questions Presented By The Petition Were Neither Raised In, Nor Passed Upon By, The Court Of Appeals	9
B. Having Failed To Appeal The ITC Determination, Aunyx Now Is Barred From Collaterally Attacking The ITC's Jurisdiction	10

Page

C. Having Failed To Appeal From The Dismissal By The District Court Of Its Other Antitrust Claims On *Res Judicata* And Collateral Estoppel Grounds, Aunyx Is Barred From Relitigating The Preclusive Effect Of An ITC Antitrust-Based Determination. 11

D. Aunyx Previously Maintained By Words And Conduct That The ITC Had Jurisdiction To Hear Claims Cognizable Under The Federal Antitrust Laws. 12

II. There Is No Conflict Among The Circuits. 14

III. Aunyx's Belated Challenge To The Jurisdiction Of The ITC Is Not Supported By The Language Of The Applicable Statutes, Legislative History Or Prior Decisions. 16

A. The ITC Has Jurisdiction To Adjudicate Antitrust-Based Claims Under Section 337. 16

B. There Is No Authority For Denying The ITC Determination *Res Judicata* Effect. 18

IV. Aunyx's Remaining Arguments Have Been Waived And Are Without Merit. 21

A. Jury Trial And Treble Damages 22

B. Judicial Estoppel. 23

Page

V. Collateral Estoppel And Aunyx's Failure To Prove "Antitrust Injury" Are Independent Grounds For Affirmance Of The Dismissal Of Aunyx's Horizontal Conspiracy Claim And For Denying The Petition. 24

A. Aunyx's Horizontal Conspiracy Claim Is Barred By Collateral Estoppel 24

B. Aunyx's Horizontal Conspiracy Claim Is Barred By Its Failure To Prove "Antitrust Injury" 26

Conclusion 28

Page

TABLE OF AUTHORITIES

Cases Cited:

Adams v. Mills, 286 U.S. 397 (1932) 10

Allen v. McCurry, 449 U.S. 90 (1980) 12

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Atlantic Richfield Co. v. USA Petroleum Co., 110 S. Ct. 1884 (1990) 25, 26, 27

Baltimore Luggage Co. v. Samsonite Corp., 727 F. Supp. 202 (D. Md. 1989), *aff'd*, 1992-2 Trade Cas. (CCH) ¶ 69,998 (4th Cir. 1992) (not officially reported) 14, 15, 18, 19, 23

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Brewer v. Madigan, 945 F.2d 449 (1st Cir. 1991) 23

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 26, 27

Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) 25

Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940) 11

Page

Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986) 17

Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) 25

Davis v. Wakelee, 156 U.S. 680 (1895) 23

Duignan v. United States, 274 U.S. 195 (1927) 10

Ellingson Timber Co. v. Great Northern Railway Co., 424 F.2d 497 (9th Cir.), *cert. denied*, 400 U.S. 957 (1970) . 22

Federal Trade Commission v. Brown Shoe Co., 384 U.S. 316 (1966) 18

Federal Trade Commission v. Cement Institute, 333 U.S. 683 (1948) 18

In the Matter of Chicory Root - Crude and Prepared, ITC Inv. No. 337-TA-27 (1976) 17

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) 11

International Brotherhood of Electrical Workers v. National Labor Relations Board, 814 F.2d 697 (D.C. Cir. 1987) 19

Katchen v. Landy, 382 U.S. 323 (1966) 22

Page

Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985) 17

Montana v. United States, 440 U.S. 147 (1979) 12

O.S.C. Corp. v. Apple Computer, Inc., 601 F. Supp. 1274 (C.D. Cal. 1985), *aff'd*, 792 F.2d 1464 (9th Cir. 1986) 26

Pignons S.A. de Mecanique v. Polaroid Corp., 701 F.2d 1 (1st Cir. 1983) 12

Safeway Stores, Inc. v. Oklahoma Retail Grocers Association, 360 U.S. 334 (1959) 10

Stevenson v. Grentec, Inc., 652 F.2d 20 (9th Cir. 1981), *cert. denied*, 456 U.S. 943 (1982) 14, 15

Stoll v. Gottlieb, 305 U.S. 165 (1938) 10, 11

Union Manufacturing Co. v. Han Baek Trading Co., 763 F.2d 42 (2d Cir. 1985) 15, 19, 21

United States v. American College of Physicians, 475 U.S. 834 (1986) 19

United States v. Oregon Lumber Co., 260 U.S. 290 (1922) 22

United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966) 20, 21

Page

University of Tennessee v. Elliott, 478 U.S. 788 (1986) ... 25

Statutes and Rules Cited:

15 U.S.C. § 1 ..... 4, 16

15 U.S.C. § 2 16

15 U.S.C. § 16(a) 20

19 U.S.C. § 1337 3

19 U.S.C. § 1337(b)(1) 14, 23

19 U.S.C. § 1337(c) 10

19 U.S.C. § 1337(d) 14

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42 Stat. 943 (1922) 16

88 Stat. 2053 (1975) 17, 19

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Page

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98 Stat. 3362 (1984) 17

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Supreme Court Rule 15.1 1

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Page

APPENDIX

Excerpt from Initial Determination, *In the Matter of Certain Electrically-Resistive Monocomponent Toner and "Black Powder" Preparations Therefor,* ITC Inv. No. 337-TA-253 (November 10,1987) 1a

Oral Decision Granting Defendant's Motion for Directed Verdict, *Aunyx Corporation and Aunyx Business Machines Corporation v. Canon U.S.A., Inc.*, Civil Action No. 86-2083-Z (March 19,1991) 4a

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.1, the respondent provides its own statement of relevant facts in order to correct various misstatements and omissions in the Petition.[1]

A. Background.

Petitioners Aunyx Corporation and Aunyx Business Machines Corporation (collectively "Aunyx") are Massachusetts corporations. (C.A. App. at 13). Respondent, Canon U.S.A., Inc. ("Canon"), is a New York corporation which markets Canon-brand products including the Canon "New Process" (NP) line of business copiers ("NP Copiers") and toner (*i.e.*, ink) for such copiers ("NP Toner"). (C.A. App. at 130).

Canon markets its NP Copier products through a nationwide network of approximately 500 independent, authorized dealers which sell machines and supplies and provide maintenance service to end-users. (C.A. App. at 130-131).

On March 1, 1979, Canon and Aunyx entered into Canon's then-standard form of copier dealer agreement, entitled Copier Division Manufacturer/Dealer Agreement ("Manufacturer/Dealer Agreement"), appointing Aunyx as a non-exclusive authorized dealer of certain NP Copier models, with primary sales and service responsibility in Plymouth County, Massachusetts. (C.A. App. at 131, 723-725).

In August 1982, Canon informed its dealers that it intended to promulgate a new form of dealer agreement that would more

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1. "Pet." refers to the Petition for a Writ of Certiorari and the Appendix thereto. "Res. App." refers to the Respondent's Appendix accompanying this Brief in Opposition. "C.A. App." refers to the Appendix jointly filed in the Court of Appeals.

explicitly prohibit certain specified practices, including "skating," alternatively defined as (1) transshipping by authorized dealers to unauthorized dealers and (2) marketing by authorized dealers outside their primary marketing areas. Both variations of the practice resulted in "free riding" on the promotional, sales and service efforts and expenditures made by authorized Canon dealers in their primary marketing areas. (C.A. App. at 113, 652, 726-727).

The new NP Copier Retail Dealer Agreement ("Retail Dealer Agreement"), distributed to all authorized dealers for execution commencing in March 1983, provided that the dealer could sell only at retail, *i.e.*, to end-users, and that the dealer could not sell outside its area of service capability unless it made suitable arrangements for another authorized dealer to provide service. (C.A. App. at 133, 749-753). Every Canon NP Copier dealer, except Aunyx, signed the Retail Dealer Agreement. Aunyx refused and continued as a dealer pursuant to the Manufacturer/Dealer Agreement. (C.A. App. at 133).

Meanwhile, starting in 1981, Aunyx spent millions of dollars developing, manufacturing and marketing its own brand of NP Toner. (C.A. App. at 14, 435, 440). However, Aunyx failed to successfully market Aunyx NP Toner. (C.A. App. at 134, 366, 440). Aunyx claims it then decided to market Canon NP Toner in competition with Canon's dealer network. (C.A. App. at 29, 372, 379-380). Aunyx began to obtain larger quantities of Canon NP Toner from Canon, which Aunyx intended to resell to unauthorized dealers and end-users nationwide, mainly by means of telemarketing. (C.A. App. at 7, 29, 379-382).

In October 1985, Canon determined that certain dealers were ordering much more Canon NP Toner than they needed to maintain the NP Copiers they sold and/or serviced — *i.e.*, their "field populations." Canon informed all its dealers that it reserved the right to limit Canon NP Toner purchases based on Canon's

estimate of the requirements of the dealer's field population. (C.A. App. at 140, 770). The policy was designed, *inter alia*, to enhance the strength of Canon's dealer network by providing full-service dealers who made expenditures to develop markets for NP Copiers in their primary marketing areas with revenues from Canon NP Toner sales to end-users in those areas. (C.A. App. at 140). Pursuant to the policy, Canon placed limitations on the amount of Canon NP Toner that Aunyx and other dealers could purchase from it. (C.A. App. at 140-141, 771-772).

B. The ITC Section 337 Proceeding.

In July 1986, Aunyx filed two substantially identical Complaints against Canon, one in the District Court for the District of Massachusetts, and the other with the International Trade Commission ("ITC" or "Commission") under Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337 ("Section 337").[2] (C.A. App. at 134; Pet. at 57-59).

Aunyx's ITC pleadings alleged that it was injured by Canon's commission of various antitrust violations and other unfair acts in connection with Canon's marketing of Canon NP Toner. *See* 51 Fed. Reg. 29,709 (1986). Significantly, Aunyx alleged that "Canon's unfair methods of competition and unfair acts can be classified in six distinct categories, *each cognizable under the U.S.*

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2. At the time of the commencement of the Section 337 proceeding and this action, Section 337 provided in relevant part that:

> Unfair methods of competition and unfair acts in the importation of articles into the United States, . . . the effect or tendency of which is . . . to restrain trade or monopolize trade and commerce in the United States, are declared unlawful.

antitrust laws and common law of unfair competition" (emphasis supplied).[3] For these alleged violations, Aunyx sought an exclusion order permanently prohibiting importation of Canon NP Toner into the United States. (C.A. App. at 78-79).

During approximately one year of pre-hearing discovery, hundreds of thousands of pages of Aunyx, Canon and third-party documents were produced; more than 100 written interrogatories were answered by the parties; and 33 individuals provided over 70 days of deposition testimony. (C.A. App. at 175; Pet. at 60).

Late in the proceeding, Aunyx moved to further amend its ITC pleadings to add a claim that Canon and certain of its dealers had conspired to adopt the marketing restrictions embodied in the new Retail Dealer Agreement, and to restrict the amount of Canon NP Toner that dealers could purchase from Canon, in order to divide the market for Canon NP Toner among the dealers in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. (C.A. App. at 86; Pet. at 60). Canon opposed the motion, arguing that the proposed amendment (1) failed to allege injury to a domestic industry or an exclusion of competitors and therefore failed to state a claim under Section 337; and (2) was untimely.[4] Contrary to Aunyx's repeated assertions (Pet. at 11-12,13, 47), Canon did *not* oppose the motion on the ground that the ITC lacked jurisdiction to hear the claim. The Administrative Law Judge ("ALJ") denied the motion solely "on the ground of untimeliness." (C.A. App. at 86; Pet. at 12, 61). Aunyx never sought review by the ITC or the Federal Circuit of the denial of its motion to amend. (Pet. at 61).

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3. Amended Verified Complaint Under Section 337 Of The Tariff Act Of 1930, As Amended, And Verified Supplement Thereto, July 29,1986, at 13.

4. *See* Respondents' Opposition To The Joint Motion Of The Commission Investigative Staff And Complainant Aunyx Corporation To Amend Complaint And Notice Of Investigation, April 3,1987.

During the eleven-day hearing that commenced in August 1987, the testimony of 43 witnesses, 84 written witness statements and over 1,000 exhibits were admitted into evidence. (C.A. App. at 176; Pet. at 87). Each witness was subject to direct and cross-examination by Aunyx, Canon and the ITC Investigative Staff. (C.A. App. at 176; Pet. at 94). The transcript of the hearing approaches 4,000 pages. (C.A. App. at 176).

Evidence concerning the policies purportedly giving rise to Aunyx's horizontal conspiracy claim was introduced in support of Aunyx's other antitrust claims and was received by the ALJ. Specifically, in urging the ALJ to find that Canon had violated Section 337, Aunyx asserted at the hearing that Canon's prohibition of "skating" and Canon's limitations on Aunyx's purchases of Canon NP Toner resulted in unlawful exclusive territorial restrictions. (C.A. App. at 219-220).[5]

In November 1987, the ALJ issued an exhaustive 182-page decision containing 457 fully annotated findings of fact ("ALJ Opinion"). With respect to the marketing restrictions which Aunyx claims were the product of a horizontal conspiracy, the ALJ found that:

> Here . . . the territorial restrictions have a legitimate business purpose and are absolved under the rule of reason. Canon and the end-users depend upon the dealers in this service-intensive market to keep the Canon machines running properly. Without the profit from supplies, the dealers have less incentive to provide service to a particular customer . . . .

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5. Pre-hearing discovery dealt with these events in detail. *(See* C.A. App. at 478-496, 617-722, 726-727, 733-740, 747-772).

> Of course, if Canon can't provide adequate service for its copiers through the dealer network, it won't be able to continue to sell copiers . . . . [W]ithout such restriction dealers could "take a 'free ride' on these services by not providing them, selling [toner] at a lower price, and at the same time enjoying the competitive benefits to the brand flowing from the providing dealer's expenditures". . . .
>
> * * *
>
> In sum, Canon's territorial restrictions, when examined under the rule of reason, were not so unreasonable as to rise to the level of a restraint of trade.

ALJ Opinion at 159-160 (citations omitted).[6]

Aunyx acknowledged on appeal to the ITC that the ALJ had considered both the anti-"skating" provisions in the 1983 Retail Dealer Agreement and the 1985 toner purchasing limitations. (C.A. App. at 228-230). Aunyx told the ITC that the ALJ *"correctly and comprehensively* made the findings of fact relevant to Canon's restrictions on intrabrand toner competition" (C.A. App. at 228-229 (emphasis supplied)). Aunyx only disagreed with the ALJ's "ultimate conclusion" that "Canon's conduct" did not "rise to the level of restraint of trade." (C.A. App. at 233). In February 1988, the ITC unanimously held that Aunyx had not proven any of its claims, thereby terminating the investigation and effectively

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6. The complete public version of the ALJ Opinion was admitted by the District Court at trial. The section analyzing the competitive impact and propriety of the conduct challenged by Aunyx in this action, entitled "Restrictions on Intrabrand Competition," is reproduced in Res. App. at 1a-3a.

dismissing Aunyx's claims with prejudice. (Pet. at 61,117-121).

In April 1988, Aunyx filed a Petition for Review with the Court of Appeals for the Federal Circuit. In July 1988, Aunyx moved to dismiss its appeal. (C.A. App. at 75-76). In August 1988, the Federal Circuit granted the motion and ordered the appeal dismissed (Pet. at 13, 61, 122-123), thereby rendering the ITC determination final.

C. The District Court Action.

Having elected to pursue its claims under the expedited procedures available at the ITC, Aunyx took no steps during the pendency of the Section 337 proceeding to prosecute those same claims in the District Court. (Pet. at 59-60). In June 1987, shortly after it unsuccessfully had sought to further amend its ITC pleadings, Aunyx moved to further amend its Complaint in the District Court to add, *inter alia*, its horizontal conspiracy claim. Canon opposed the motion, but in December 1987 the District Court granted leave to amend.

In April 1988, after the ITC had dismissed all of Aunyx's claims, Aunyx filed its Second Amended Complaint in the District Court, which restated the same federal antitrust and common law tort claims previously tried and dismissed by the ITC, and added the claim that Aunyx had waited too long to assert at the ITC — that Canon and its dealers conspired to divide the market for Canon NP Toner. (C.A. App. at 12-34).[7]

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7. The Second Amended Complaint also added a claim that Canon breached the Manufacturer/Dealer Agreement by imposing the toner purchasing limitations in 1985 and cancelling the Agreement in 1988. (C.A. App. at 31-32). The District Court's dismissal of that count was affirmed by the Court of Appeals. (Pet. at 77-85). The breach of contract count is not discussed in the Petition.

In November 1988, Canon moved for summary judgment dismissing the Second Amended Complaint, principally due to the preclusive effect of the ITC determination. (C.A. App. at 73-74; Pet. at 61-62). In June 1989, the District Court agreed as to all of Aunyx's antitrust claims except the horizontal conspiracy claim, holding that as a result of the ALJ's rejection of Aunyx's untimely motion to add this "related claim," Aunyx was unable to "fully litigate" the claim. (Pet. at 13, 62-63, 86-96). In August 1989, a Final Judgment was entered on all the dismissed antitrust counts pursuant to Fed. R. Civ. P. 54(b). (C.A. App. at 196; Pet. at 63). Aunyx did not appeal from the *res judicata*/collateral estoppel dismissal of its originally pleaded antitrust claims. (Pet. at 63).

The liability phase of Aunyx's horizontal conspiracy claim proceeded to trial in March 1991. (C.A. App. at 289; Pet. at 14, 64). At the close of Aunyx's case, Canon moved for a directed verdict on various grounds, including the preclusive effect of the ITC determination and Aunyx's failure to prove a *prima facie* case, including the element of "antitrust injury." (C.A. App. at 581, 594-599). The District Court (Zobel, J.) granted Canon's motion, holding that Aunyx had failed to prove "antitrust injury." (Res. App. at 4a-9a; Pet. at 64).

Following entry of Final Judgment (Pet. at 111-116), Aunyx appealed to the First Circuit, where it attacked the District Court's decision that Aunyx had failed to make a *prima facie* showing of "antitrust injury." In response, while maintaining that the District Court plainly was correct in so holding, Canon's lead argument for affirmance was that the horizontal conspiracy claim was barred by *res judicata* and collateral estoppel. *See* Brief for Defendant-Appellee, October 30, 1991, at 14-23. Aunyx did not file a reply brief.

On October 21, 1992, the First Circuit affirmed the judgment of the District Court, holding that Aunyx's horizontal conspiracy

claim was barred by *res judicata.* (Pet. at 51-85). Relying upon decisions of this Court establishing that rulings of administrative agencies are entitled to *res judicata* effect when the agency acted in a judicial capacity, the First Circuit ruled that all requirements for application of *res judicata* had been satisfied. (Pet. at 65-77).

REASONS FOR DENYING THE WRIT

I.

AUNYX IS PRECLUDED FROM MAINTAINING THAT THE ITC LACKED JURISDICTION TO HEAR CLAIMS COGNIZABLE UNDER THE FEDERAL ANTITRUST LAWS OR THAT THE ITC DETERMINATION IS NOT ENTITLED TO *RES JUDICATA* EFFECT.

The Petition is noteworthy for its failure to discuss the careful analysis in the opinion by the Court of Appeals that Aunyx asks this Court to review. Instead, Aunyx seeks review on the basis of arguments that Aunyx did not raise before the ITC or the Court of Appeals. There are numerous independently sufficient reasons why this Court should decline to hear Aunyx's arguments.

A. The Questions Presented By The Petition Were Neither Raised In, Nor Passed Upon By, The Court of Appeals.

Aunyx did not ask the Court of Appeals to find that the ITC lacked jurisdiction to hear antitrust-based claims under Section 337, or that Canon should be estopped from seeking to dismiss the horizontal conspiracy claim on *res judicata* grounds. Notwithstanding that the preclusive effect of the ITC determination was Canon's lead argument before the Court of Appeals for affirmance of the District Court judgment, Aunyx did not even respond to Canon's preclusion arguments in the Court of Appeals. Moreover, after suffering an affirmance on *res judicata* grounds, described by Aunyx as a "rather unusual disposition of

the appeal" (Pet. at 15), Aunyx did not seek a rehearing in the Court of Appeals. There are no exceptional circumstances here warranting further review. *See Safeway Stores, Inc. v. Oklahoma Retail Grocers Association*, 360 U.S. 334, 342 n.7 (1959) (Court declined to hear claim that Oklahoma statute proscribing sales below cost was pre-empted by federal antitrust laws because claim was not made below); *Adams v. Mills*, 286 U.S. 397, 416-417 (1932) (Court declined to entertain challenge to jurisdiction of Interstate Commerce Commission which was not urged below); *Duignan v. United States*, 274 U.S. 195, 200 (1927) ("It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed").

B. Having Failed To Appeal The ITC Determination, Aunyx Now Is Barred From Collaterally Attacking The ITC's Jurisdiction.

When the ITC, at Aunyx's request, investigated, adjudicated and dismissed Aunyx's originally pleaded antitrust-based claims, it necessarily determined that it had jurisdiction to hear those claims. *See, e.g., Stoll v. Gottlieb*, 305 U.S. 165, 171-172 (1938) ("Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter"). Here, recognizing that "[t]he antitrust laws and the practice thereunder are at least one standard for 'unfair methods of competition and unfair acts' under Section 337" (citation omitted), the ALJ expressly held that "acts or practices which are violative of the Sherman Act are necessarily unfair methods of competition and unfair acts under Section 337." (ALJ Opinion at 176).

Aunyx admits that its exclusive avenue of review of the ITC determination was a direct appeal to the Federal Circuit. (Pet. at 23; *see* 19 U.S.C. § 1337(c); 28 U.S.C. § 1295(a)(6)). Since it abandoned its appeal to the Federal Circuit, thereby rendering the ITC determination final, Aunyx is precluded from collaterally attacking the ITC's jurisdiction to hear antitrust-based claims

against Canon under Section 337. "A party that has had an opportunity to litigate the question of subject matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata apply to jurisdictional determinations — both subject matter and personal." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982); *see also Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 377 (1940); *Stoll v. Gottlieb*, 305 U.S. at 171-172.

C. Having Failed To Appeal From The Dismissal By The District Court Of Its Other Antitrust Claims On *Res Judicata* And Collateral Estoppel Grounds, Aunyx Is Barred From Relitigating The Preclusive Effect Of An ITC Antitrust-Based Determination.

When Canon moved in the District Court in November 1988 for summary judgment dismissing Aunyx's antitrust claims on *res judicata* and collateral estoppel grounds, Aunyx responded with the very arguments it now raises in its Petition — that the ITC lacked subject matter jurisdiction to hear such claims, that a jury trial and treble damages were not available to Aunyx at the ITC, and that Canon was judicially estopped from moving for summary judgment on preclusion grounds.[8] In dismissing all of Aunyx's antitrust claims which were tried at the ITC, the District Court expressly rejected Aunyx's contention that the ITC's determination of Aunyx's antitrust-based claims under Section 337 was not entitled to preclusive effect. (Pet. at 86-96). Since it failed to appeal from the Final Judgment entered on such claims under Fed. R. Civ. P. 54(b), Aunyx now is barred from further contesting the preclusive effect of ITC determinations of antitrust-based claims.

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8. *See* Transcript of Oral Argument of Motion for Summary Judgment, May 22, 1989, at 23-26; Supplemental Brief For Aunyx Business Machines Corporation In Opposition To Summary Judgment Motion, May 26, 1989, at 4-5.

Under the doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision precludes relitigation of the issue on a different cause of action involving a party to the prior determination. *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Montana v. United States*, 440 U.S. 147,153 (1979). Here, the parties conclusively litigated the propriety of giving preclusive effect to the ITC's determination of antitrust-based claims under Section 337, and having failed to seek review of the Final Judgment entered by the District Court on those claims, Aunyx is barred from seeking to relitigate that issue. "[O]ne opportunity to litigate an issue fully and fairly is enough." *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1, 2 (1st Cir. 1983) (citation omitted).

D. Aunyx Previously Maintained By Words And Conduct That The ITC Had Jurisdiction To Hear Claims Cognizable Under The Federal Antitrust Laws.

Aunyx repeatedly invoked the jurisdiction of the ITC to hear *all* its antitrust claims, staunchly defended the ITC's authority to adjudicate such claims under Section 337, and successfully induced the ITC to decide all its antitrust-based claims that were timely asserted. Curiously, Aunyx has failed to so state in its Petition.

At the ITC, Aunyx characterized all its claims as being "cognizable under the U.S. antitrust laws." *See* pp. 3-4, *supra*. Moreover, when Aunyx moved that its ITC Amended Complaint be further amended to include its claim that Canon and its dealers had conspired to "violat[e] section 1 of the Sherman Act,"[9] Aunyx stated:

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9. Joint Motion Of The Commission Investigative Staff And Complainant Aunyx Corporation To Amend Complaint And Notice Of Investigation, March 16,1987, at 1.

> The Aunyx complaint against Canon lies at the heart of Section 337; all the legislative history associated with its predecessor in 1922 indicates that its drafters were primarily concerned with antitrust-type issues. . . . [I]t was seen as a broad antitrust type of trade law that could be used against the giant foreign cartels competing against U.S. industries.[10]

Aunyx's present position cannot be reconciled with its prior words and conduct. If Aunyx seriously maintained that the ITC lacked jurisdiction to adjudicate claims cognizable under the federal antitrust laws, why did it repeatedly invoke the ITC's jurisdiction to hear such claims — including the horizontal conspiracy claim — under Section 337? Even if its loss at the ITC caused it to have belated second thoughts about the breadth of the ITC's jurisdiction under Section 337, why did it not question such jurisdiction (1) on appeal of the ALJ's determination to the Commission; (2) on appeal of the Commission's decision to the Federal Circuit; (3) on appeal to the First Circuit from the District Court's first Rule 54(b) judgment dismissing Aunyx's originally pleaded antitrust claims on *res judicata* and collateral estoppel grounds; or (4) in response to Canon's *res judicata* and collateral estoppel arguments to the Court of Appeals in support of affirming the District Court's later dismissal of the horizontal conspiracy claim?

Although the Petition makes no effort to deal with any of these questions, the answers nevertheless are apparent — Aunyx

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10. Reply Memorandum In Support Of Joint Motion Of The Commission Investigative Staff And Complainant Aunyx Corporation To Amend Complaint And Notice Of Investigation, April 10, 1987, at 5.

invoked the jurisdiction of the ITC to hear its antitrust claims under Section 337 to avail itself of the ITC's expedited procedures (*see* 19 U.S.C. § 1337(b)(1)) and the opportunity to seek a potentially devastating exclusion order against Canon (*see* 19 U.S.C. § 1337(d)), and it hoped to use a favorable ITC determination offensively on the basis of *res judicata* and/or collateral estoppel to collect damages from Canon in the District Court. This thirteenth hour change of position, after 6-1/2 years of litigation, is a mere afterthought designed to rescue Aunyx from a calculated, albeit unsuccessful, litigation strategy.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS.

Contrary to Aunyx's assertion, there is no conflict among the Circuit Courts of Appeal with respect to the issues Aunyx raises in this Court. Aunyx has cited no case in which any court has held that (1) the ITC lacks jurisdiction under Section 337 to adjudicate a claim based on conduct cognizable under the federal antitrust laws; and/or (2) an ITC determination in a non-patent Section 337 proceeding is not entitled to *res judicata* effect. Indeed, there is absolute consistency among the Circuits — uniformly against Aunyx — on these issues.

Other than the present case, there is only one case of which we are aware that deals with the application of *res judicata* to an ITC determination in an antitrust-based Section 337 proceeding. That case held that *res judicata* effect is warranted. *See Baltimore Luggage Co. v. Samsonite Corp.*, 727 F. Supp. 202, 205-207 (D. Md. 1989), *aff'd*, 1992-2 Trade Cas. (CCH) ¶ 69,998 (4th Cir. 1992) (not officially reported) (*"Baltimore Luggage"*).

The only case cited by Aunyx to demonstrate the purported conflict among the Circuits *is Stevenson v. Grentec, Inc.*, 652 F.2d

20 (9th Cir. 1981), *cert. denied*, 456 U.S. 943 (1982), denying *res judicata* effect to a Court of Customs and Patent Appeals decision in an ITC Section 337 *patent* proceeding. The futility of Aunyx's effort to draw a parallel to patent cases is underscored by the Second Circuit's opinion in *Union Manufacturing Co. v. Han Baek Trading Co.*, 763 F.2d 42, 45-46 (2d Cir. 1985) (*"Union Manufacturing"*), which was cited with approval in *Baltimore Luggage* and by the Court of Appeals in the present case (*see* Pet. at 73).

In *Union Manufacturing*, Union had charged at the ITC that Han Baek and other importers had violated Section 337. The ITC found that the design of Union's product did not constitute a common law trademark and that Han Baek's similar design did not constitute false designation of origin. Rather than appealing the ITC decision to the Federal Circuit, Union filed an action in the district court renewing the same claims it had asserted at the ITC. Han Baek argued that the suit was barred by *res judicata*. In opposition, Union relied upon the same authority as Aunyx does here — cases and legislative history denying *res judicata* effect to ITC *patent* determinations.

In barring Union's claim on the ground of *res judicata*, the Second Circuit ruled that "the legislative history of the Trade Reform Act of 1974 as it pertains to the *res judicata* effect of ITC patent validity determinations . . . and decisions of federal courts and the ITC in patent validity cases" have "no bearing on ITC unfair trade practice and trademark determinations." 763 F.2d at 45 (citations omitted). Writing for a unanimous panel, Judge Newman concluded that "[t]he jurisdictional bar to *res judicata* treatment of ITC patent validity determinations simply does not apply to other decisions by the ITC." *Id.*

Accordingly, there is no conflict among the Circuits concerning the *res judicata* effect of ITC Section 337

determinations in antitrust or, for that matter, any non-patent proceedings. Moreover, since the application of *res judicata* to ITC antitrust rulings has been the subject of only two cases in the more than 60 years since the adoption of Section 337, Aunyx's contention that "[t]his case presents an issue of continuing importance" (Pet. at 16) rings hollow.

III.

AUNYX'S BELATED CHALLENGE TO THE JURISDICTION OF THE ITC IS NOT SUPPORTED BY THE LANGUAGE OF THE APPLICABLE STATUTES, LEGISLATIVE HISTORY OR PRIOR DECISIONS.

A. The ITC Has Jurisdiction To Adjudicate Antitrust-Based Claims Under Section 337.

Section 337's prohibition of "[u]nfair methods of competition and unfair acts" in connection with the importation of goods having "the effect or tendency . . . to restrain or monopolize trade and commerce in the United States" originally was codified by Congress as Section 316 of the Tariff Act of 1922 (42 Stat. 943 (1922)), which was later incorporated into Section 337. It is readily apparent that this language is patterned after the Sherman Act, 15 U.S.C. §§ 1, 2. It is equally clear, as Aunyx itself argued at the ITC (*see* p. 13 *supra*), that all methods of unfair competition, including antitrust violations, are prohibited by Section 337. As stated in the Senate Report accompanying the passage of Section 316 of the Tariff Act of 1922, "[t]he provision relating to unfair methods of competition in the importation of goods is broad enough to prevent every type and form of unfair practice. . . ." S. Rep. No. 595, 65th Cong., 2d Sess. at 3 (1922).

The ITC consistently has interpreted its authority to include the power to determine whether an importer violated Section 337

by conduct prohibited by the federal antitrust laws. *See, e.g.*, ALJ Opinion at 176; *In the Matter of Chicory Root — Crude and Prepared*, ITC Inv. No. 337-TA-27 (1976) (available on LEXIS, ITRADE Library, ALLITC File); *see also* H. Kaye, P. Plaia, M. Hertzberg, *International Trade Practice* §§ 5.02, 5.20-5.23, 7.02 (1987). Congress never has overruled the ITC's exercise of jurisdiction to adjudicate antitrust-based claims despite Congress' repeated amendment of Section 337 over the last 20 years.[11] *See Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 846 (1986) ("[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress' " (citation omitted)).

Relying upon *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985), Aunyx argues that because its horizontal conspiracy claim "was within the exclusive jurisdiction of the District Court, the ITC had no jurisdiction to decide that claim. . . ." (Pet. at 37-38). However, Aunyx has misplaced its reliance upon *Marrese* in contending that the federal courts' "exclusive jurisdiction" over federal antitrust claims deprives the ITC of jurisdiction to determine in Section 337 proceedings whether the antitrust laws have been violated. In *Marrese*, this Court held that the federal courts' exclusive jurisdiction over federal antitrust claims is *not* dispositive of whether state antitrust law determinations should be given preclusive effect pursuant to full faith and credit in a subsequent federal action. 470 U.S. at 380-381.

Moreover, this Court has ruled that the federal courts'

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11. *See* 88 Stat. 2053 (1975); 93 Stat. 193, 310 (1979); 94 Stat. 1744 (1980); 96 Stat. 48, 49 (1982); 98 Stat. 3362 (1984);102 Stat. 1157, 1212 (1988);102 Stat. 3807 (1988).

exclusive jurisdiction over antitrust actions does not deprive federal agencies of congressionally-granted authority to determine that "conduct tending to restrain trade is an unfair method of competition even though the selfsame conduct may also violate the Sherman Act." *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 693 (1948). In *Cement Institute*, the defendant challenged the authority of the Federal Trade Commission ("FTC") to determine whether Section 5 of the Federal Trade Commission Act, which prohibits "unfair methods of competition," was violated by price fixing conduct violative of the Sherman Act. The defendant argued in support of its position, as Aunyx does here, that the federal courts have exclusive jurisdiction over Sherman Act claims. Upon review of relevant legislative history and its prior decisions, this Court determined that the authority granted by Congress to the FTC included the power to determine whether conduct constituting a violation of the Sherman Act also constituted an "unfair method of competition" prohibited by the FTC Act. 333 U.S. at 689-694. This Court has adhered to that view in subsequent cases. *See, e.g., Federal Trade Commission v. Brown Shoe Co.*, 384 U.S. 316, 320-321 (1966).

Similarly, the federal courts' exclusive jurisdiction over antitrust actions does not deprive the ITC of the authority granted to it by Congress to determine whether acts violative of the antitrust laws constitute "unfair methods of competition" in the context of the importation of goods into the United States. Aunyx has offered no authority for the proposition that "the term 'unfair method of competition' should not be construed as embracing any conduct within the ambit of the Sherman Act." *Cement Institute*, 333 U.S. at 692; *see Baltimore Luggage*, 727 F. Supp. at 207.

B. There Is No Authority For Denying The ITC Determination *Res Judicata* Effect.

Neither the cases cited by Aunyx denying preclusive effect to

ITC patent-based determinations, nor the legislative history of Section 337, supports withholding *res judicata* effect from ITC decisions in non-patent proceedings. *See* pp. 14-16, *supra; see also Baltimore Luggage*, 727 F. Supp. at 205-207. Aunyx relies upon two passages from the Senate Finance Committee Report on the Trade Act of 1974 in contending that Congress did not intend ITC antitrust-based determinations to have preclusive effect. *See* Pet. at 32-34; S. Rep. No. 1298, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Adm. News 7186 ("Report"). Neither of these passages demonstrates such intent.

The first passage is excerpted from a portion of the Report's description of the "Principal features of the bill" which summarizes the Finance Committee's proposed additions to that part of the Trade Act of 1974 which would amend Section 337. *See* Report at 7211-7212. The Finance Committee enumerated seven proposed additions, six of which are reflected in language contained in the statute as enacted. The seventh, concerning *res judicata* and collateral estoppel, is *not* reflected in the statute as enacted. *See* 88 Stat. 2053 (1975). Thus, the Finance Committee comment regarding preclusive effect quoted by Aunyx (Pet. at 32-33), whatever its intent, never found its way into the amendment of Section 337. *See International Brotherhood of Electrical Workers v. National Labor Relations Board*, 814 F.2d 697, 712 (D.C. Cir. 1987) ("[A] cardinal principle of the judicial function of statutory interpretation is that courts have no authority to *enforce* principles gleaned *solely* from legislative history that has no statutory reference point" (citing *United States v. American College of Physicians*, 475 U.S. 834, 846-847 (1986) (emphasis in original)). Furthermore, the second passage quoted by Aunyx (Pet. at 33-34) applies only to patent validity determinations, as found by the Second Circuit in *Union Manufacturing*, 763 F.2d at 46 n.6.

It is equally true that nothing in the federal antitrust laws demonstrates a congressional intent to deprive ITC antitrust-based

determinations of preclusive effect. On the contrary, a 1980 amendment to Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), evidences congressional intent to grant preclusive effect to antitrust determinations by federal administrative agencies other than the FTC. Section 5(a) of the Clayton Act generally provides that final judgments against defendants in antitrust actions brought by the United States are *prima facie* evidence against such defendants in subsequent proceedings. The 1980 amendment added the following to Section 5(a):

> Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel, except that, in any action or proceeding brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission under the antitrust laws or under section 45 of this title which could give rise to a claim for relief under the antitrust laws.

As originally drafted in the House of Representatives, the amendment would have denied preclusive effect to antitrust determinations by *all* federal agencies. However, the provision was modified before passage so as to be applicable only to FTC findings. *See* H.R. Conf. Rep. No. 1234, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S. Code Cong. & Adm. News 2781, 2783. This legislative history of the 1980 amendment to Section 5 of the Clayton Act (more recent than that of the 1974 amendment to Section 337 referred to by Aunyx) evidences Congress' intent that antitrust-based determinations by federal agencies other than the FTC (such as the ITC) have preclusive effect in subsequent antitrust actions.

In sum, there is no reliable authority (case, statutory or otherwise) for departing from this Court's holdings in *United*

States v. Utah Construction & Mining Co., 384 U.S. 394 (1966), and subsequent cases, that administrative determinations made in a judicial capacity are entitled to preclusive effect. *See Astoria Federal Savings and Loan Association v. Solimino*, 111 S. Ct. 2166, 2169-2170 (1991) ("[W]here a common-law principle is well established, as are the rules of preclusion . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident' "(citations omitted)). As the Second Circuit aptly observed in *Union Manufacturing:*

> To hold otherwise would undermine the legitimacy of the ITC proceeding; the party losing the administrative adjudication could simply file an identical action in a federal district court and thereby avoid the strict standard of review governing appeal of ITC determinations in the Federal Circuit. Litigants should not be able to circumvent the decisional authority of the ITC and the reviewing authority of the Federal Circuit by filing in a district court what amounts to a collateral attack on the ITC determination.

763 F.2d at 45 (footnote omitted).

IV.

AUNYX'S REMAINING ARGUMENTS HAVE BEEN WAIVED AND ARE WITHOUT MERIT.

Aunyx's arguments that it was deprived of the opportunity to seek a jury trial and treble damages at the ITC, and that Canon is judicially estopped from relying upon its preclusion arguments by its opposition to Aunyx's motion for leave to amend at the ITC,

were foreclosed long ago. These arguments were raised by Aunyx and rejected by the District Court when it granted summary judgment dismissing Aunyx's originally pleaded antitrust claims in August 1989. *See* p. 8, *supra*. Aunyx is collaterally estopped from relitigating these issues by its failure to appeal from the Final Judgment entered on those claims. *See* pp. 10-11, *supra*. In any event, none of these arguments was raised before the Court of Appeals, and each is without merit.

A. Jury Trial and Treble Damages.

Aunyx's calculated decision to pursue its claims before the ITC, where it knew a jury trial was not available, cannot give rise to a wrongful deprivation of any right to a jury trial. *See Katchen v. Landy*, 382 U.S. 323, 336-339 (1966); *Baltimore Luggage Co. v. Samsonite Corp.*, 1992-2 Trade Cas. (CCH) ¶ 69,998 at 68,840 (4th Cir. 1992) (not officially reported) ("[Plaintiff] was not precluded, during the ITC's investigation, to seek expedited proceedings in the district court where it could have asserted its seventh amendment right to a jury trial prior to the ITC determination"). This Court's precedents confirming the propriety of administrative preclusion would be meaningless if every administrative proceeding's preclusive effect could be voided because the determination was not made by a jury.

Similarly, since Aunyx chose to prosecute its claims in a federal forum offering specified remedies *(i.e.,* cease and desist and exclusion orders), *res judicata* bars Aunyx's subsequent action asserting the same claims in another federal forum offering an alternative remedy *(i.e.,* treble damages). *See United States v. Oregon Lumber Co.*, 260 U.S. 290 (1922); *Ellingson Timber Co. v. Great Northern Railway Co.*, 424 F.2d 497 (9th Cir.), *cert. denied*, 400 U.S. 957 (1970) (Plaintiff's election to pursue remedy of "reparations" before the Interstate Commerce Commission for alleged unlawful pricing precluded subsequent district court action

under the antitrust laws seeking treble damages for the same conduct); *Baltimore Luggage*, 727 F. Supp. at 205 *(res judicata* applied to ITC antitrust ruling even though party chose not to press its antitrust defenses at the ITC because, *inter alia*, it could not obtain affirmative relief on such defenses).

When Aunyx chose to invoke the jurisdiction of the ITC under Section 337, and chose for strategic purposes not to seek suspension of the ITC investigation in favor of its pending District Court action *(see* 19 U.S.C. § 1337 (b)(1)), it assumed the risk that it would not prevail at the ITC. This choice cannot now be used as an excuse to avoid an adverse result.

B. Judicial Estoppel.

"The judicial estoppel doctrine protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by that same party in a prior proceeding." *Brewer v. Madigan*, 945 F.2d 449, 455 (1st Cir. 1991); *see Davis v. Wakelee*, 156 U.S. 680, 689 (1895). The doctrine cannot apply here against Canon for two reasons. First, while Canon opposed Aunyx's motion to add its horizontal conspiracy claim at the ITC, Canon did *not* oppose the motion on the ground that the ITC lacked subject matter jurisdiction to hear the claim. *See* p. 4, *supra*. Second, it is undisputed that the ALJ denied Aunyx's motion solely on the ground of untimeliness. (C.A. App. at 86; Pet. at 12, 60-61). Indeed, to the extent the ALJ commented on Canon's other grounds for opposing the motion, he suggested that if Aunyx had moved to add the claim in a timely fashion, the claim would have been heard. *(See* Order Denying Motion To Amend Complaint And Notice Of Investigation, April 15,1987, at 2 n.1).

Finally, Aunyx cites no evidence that Canon consented to the maintenance of simultaneous proceedings before the ITC and the

District Court. When Aunyx sought to resurrect its District Court action by moving for leave to file a Second Amended Complaint including the horizontal conspiracy claim, Canon opposed the application.[12] Moreover, Canon promptly moved for summary judgment in the District Court upon the conclusion of the Section 337 proceeding.

V.

COLLATERAL ESTOPPEL AND AUNYX'S FAILURE TO PROVE "ANTITRUST INJURY" ARE INDEPENDENT GROUNDS FOR AFFIRMANCE OF THE DISMISSAL OF AUNYX'S HORIZONTAL CONSPIRACY CLAIM AND FOR DENYING THE PETITION.

Aunyx tries to suggest that it has a meritorious claim which has not been considered in any adjudicative proceeding despite its history of losses on the merits both at the ITC and in the District Court. (Pet. at 17, 48). Lest this Court be misled into believing that justice has not been done, it should be noted that grounds other than *res judicata* compel the conclusion that this is not a case deserving this Court's attention since Aunyx cannot prevail on its antitrust claim.

A. Aunyx's Horizontal Conspiracy Claim Is Barred By Collateral Estoppel.

Even if Aunyx's horizontal conspiracy claim is not barred by *res judicata*, it is foreclosed by the doctrine of collateral estoppel, which is applicable to factual determinations made by administrative agencies acting in a judicial capacity. *See, e.g.*,

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12. *See* Memorandum Of Defendant Canon U.S.A., Inc. In Opposition To (1) Plaintiff's Motion For Leave To Amend Complaint And (2) Joint Motion To Add Aunyx Business Machines As An Intervenor-Plaintiff, July 10, 1987.

University of Tennessee v. Elliott, 478 U.S. 788, 797-798 (1986). Here, the ITC's final determination that Canon's conduct promoted interbrand competition and did not unreasonably restrain trade precludes Aunyx from proving its antitrust claim.

The Sherman Act prohibits "only *unreasonable* restraints of trade." *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988) (emphasis supplied). Even if it results in some restraint on *intrabrand* competition, a territorial restriction is not unreasonable if it increases *interbrand* competition, *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54-55 (1977), since the latter is the primary concern of the antitrust laws. *GTE Sylvania*, 433 U.S. at 52 n.19. The ultimate test of whether conduct is "unreasonable" for antitrust purposes is "whether its anticompetitive effects outweigh its procompetitive effects." *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884,1893 (1990) (*"ARCO"*).

The evidence on which Aunyx relies to establish a horizontal conspiracy in this case was culled by Aunyx from the ITC record. (C.A. App. at 478-496, 617-722, 726-804). Based on that evidence, the ITC held that any anti-competitive intrabrand impact of the Retail Dealer Agreement's territorial restrictions, and the toner purchasing limitations that purportedly were employed to enforce those restrictions, was outweighed by their pro-competitive effect on interbrand competition. (Res. App. at 1a-3a). The ITC found that by deterring "free riding" on the efforts and expenditures of Canon's full-service dealers in their respective marketing areas, Canon's policies strengthened its dealer network and enhanced its ability to compete effectively with other brands of copier systems. *Id.* In addition, to the extent the restraints at issue allegedly resulted in higher prices for Canon NP Toner (C.A. App. at 220), the ITC found that such restraints promoted interbrand competition by enhancing the ability of competitive toner producers to sell their own, less expensive brands of toner. (Res. App. at 3a).

"*Per se* and rule-of-reason analysis are but two methods of determining whether a restraint is 'unreasonable.'" *ARCO*, 110 S. Ct. at 1893. Since Canon's marketing policies passed muster under the rule of reason, there is no rational basis for applying a *per se* rule to the same conduct. *See O.S.C. Corp. v. Apple Computer, Inc.*, 601 F. Supp. 1274, 1292 (C.D. Cal. 1985), *aff'd*, 792 F.2d 1464 (9th Cir. 1986) ("Logically it should follow that a practice lawful under the rule of reason is not per se illegal").

B. Aunyx's Horizontal Conspiracy Claim Is Barred By Its Failure To Prove "Antitrust Injury."

In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (*"Brunswick"*), this Court held that a plaintiff in a private antitrust action must show more than "injury causally linked to an illegal presence in the market." Instead, it must prove "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id.* (emphasis in original). In *ARCO*, this Court explicitly rejected the claim that "antitrust injury" need not be shown upon proof of a *per se* violation:

> The *per se* rule is a method of determining whether § 1 of the Sherman Act has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury and thus whether he may recover damages under § 4 of the Clayton Act.
>
> * * *
>
> The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from [a] competition-*reducing* aspect or effect of the defendant's behavior . . . . [I]nsofar as the *per*

> *se* rule permits the prohibition of efficient practices in the name of simplicity, the need for the antitrust injury requirement is underscored.

ARCO, 110 S. Ct. at 1893-1894 (emphasis in original).

The District Court's dismissal of Aunyx's horizontal conspiracy claim for failure to prove "antitrust injury" was based on the absence of evidence that Aunyx's alleged damages arose from competition-reducing conduct by Canon. (Res. App. at 7a-9a). The record fully supports that determination for two independently sufficient reasons.

First, Aunyx's alleged injury arises from not being able to engage in the very activity that Canon sought to restrict, namely, "skating" and "free riding" by selling Canon NP Toner in markets developed by other dealers. Since the restriction of such practices was found by the ITC on balance to be pro-competitive, it is axiomatic that Aunyx cannot show that its alleged loss "stems from [a] competition-reducing aspect or effect of [Canon's] behavior," *ARCO*, 110 S. Ct. at 1894 (emphasis in original), nor an "injury of the type the antitrust laws were intended to prevent." *Brunswick*, 429 U.S. at 489. Regardless of the source of the challenged conduct — vertically imposed by Canon or horizontally imposed by its dealers — the market effect of the conduct cannot be relitigated by Aunyx.

Second, as the District Court indicated at trial, to prove anticompetitive effect of Canon's conduct, Aunyx had to present testimony by a witness with requisite knowledge or experience, utilizing a sufficient foundation of factual data and taking into account the relevant variables, showing that Aunyx would have sold sufficient amounts of Canon NP Toner at a sufficiently low price to drive down the then-existing price levels of that toner in the relevant market, identified by Aunyx as the United States and Canada. (C.A. App. at 16, 562-563).

Yet, in the face of repeated warnings by the District Court at trial that it was in danger of being non-suited, Aunyx failed to establish the prevailing price levels for Canon NP Toner and how Aunyx's marketing efforts would have affected those price levels. As the District Court observed, Aunyx failed to show that end-users would have paid lower prices had Aunyx carried out its marketing program. (C.A. App. at 582-587). The District Court properly pointed out that Aunyx was obliged to offer a "disciplined analysis of these particular markets, the particular pricing in these markets . . . how one thing or another affects prices. . .," but "we have none of that in this case, nothing." (C.A. App. at 562). Accordingly, the District Court properly held that Aunyx failed to prove that the challenged restrictions imposed by Canon on its dealers had any demonstrable anti-competitive effect in the relevant market, which effect in turn caused injury to Aunyx.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: February 16, 1993

Respectfully submitted,

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APPENDIX A — EXCERPT FROM INITIAL DETERMINATION, *IN THE MATTER OF CERTAIN ELECTRICALLY-RESISTIVE MONOCOMPONENT TONER AND "BLACK POWDER" PREPARATIONS THEREFOR*, ITC INV. NO. 337-TA-253, DATED NOVEMBER 10, 1987

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

Investigation No. 337-TA-253

IN THE MATTER OF

CERTAIN ELECTRICALLY-RESISTIVE MONOCOMPONENT TONER AND "BLACK POWDER" PREPARATIONS THEREFOR

EXCERPT FROM INITIAL DETERMINATION
(Pages 158-160)
November 10, 1987

Mathias, A.L.J.

B. Restrictions on Intrabrand Competition

Canon distributes its copier machines, replacement parts and supplies throughout the United States through a network of over 500 independent authorized dealers. The profit margins are quite low for such dealers in the sale of machines, with the dealer profits coming largely from the sale of supplies and service. (FF 147).

Copier machines are service-intensive, with the end-users relying heavily upon the dealers and the dealer technicians for repair service and preventive maintenance. (FF 148). Canon is

therefore quite dependent upon its servicing dealers to please the end-users and promote good will.

Canon dealers are signatories to an agreement with Canon whereby they are limited to selling the Canon line of products at retail only, and within a primary marketing and sales territory. This provision was designed to eliminate extraterritorial sales, called "skating" by Canon. One of the principal reasons for such restriction was "to strengthen the marketing and service capabilities of the entire network of authorized NP-copiers [sic] dealers." (FF 150). Of course, one of the effects of such provision is to reduce inter-territorial sales of Canon supplies, including toner, by Canon dealers and to help support the price of such products. (FF 153).

Under some circumstances, vertical, non-price retrictions [sic] can be found to be violative of the anti-trust laws. *See, Graphic Products Distributors, Inc. v. Itek Corporation*, 717 F.2d 1560 (11th Cir. 1983). However, such vertical restrictions must be judged by the rule of reason, and are not *per se* violations. *Continential T.V., Inc. v. GTE Sylvania Inc.*, 443 U.S. 36, 59 (1977).

Here, as in contrast to the *Graphics* case, *supra*, the territorial restrictions have a legitimate business purpose and are absolved under the rule of reason. Canon and the end-users depend upon the dealers in this service-intensive market to keep the Canon machines running properly. Without the profit from supplies, the dealers have less incentive to provide service to a particular customer. (FF 246). Of course, if Canon can't provide adequate service for its copiers through the dealer network, it won't be able to continue to sell copiers. As noted in the *Graphics* case, *supra* at 1567, without such restriction dealers could "take a 'free ride' on

these services by not providing them, selling [toner] at a lower price, and at the same time enjoying the competitive benefits to the brand flowing from the providing dealer's expenditures." (Citing to the *Sylvania* decision, at 55 n. 23).

Furthermore, to the extent Canon's territorial restrictions on toner reduced intrabrand competition and raised prices on Canon brand toner, such restrictions "tend to improve rather than impair the opportunity for the monopolist's actual or potential rivals in the manufacture of the monopolized product." Areeda and Turner, *Antitrust Law*, ¶828d, Vol. III, p. 327 (1978). *See also, Continential T.V.*, [sic] *supra*, at 56 n. 24. In this connection it must be noted that a number of the dealers were testing competitive toners throughout the time period under investigation, and several were purchasing generic, or private label toners, toward the end of the time period under investigation. (FF 338-50).

In sum, Canon's territorial restrictions, when examined under the rule of reason, were not so unreasonable as to rise to the level of a restraint of trade.

However, Canon's other alleged unfair trade practices, if substantiated, must be viewed in the light of such territorial restrictions. The evidence shows that the dealers exercised considerable influence over the machine user's choice of supplies. (FF 148). The evidence also shows that the dealers were quite insistent on being the end-user's source of supply. (FF 246). Therefore, any disparagement or other unfair acts against competing toner producers, by Canon dealers, was likely to be more effective. In view of the fact the dealers did not have to fear competition on the Canon Brand, they were more susceptible to restrictions on competitive brands of toner.

APPENDIX B — ORAL DECISION GRANTING DEFENDANT'S MOTION FOR DIRECTED VERDICT, *AUNYX CORPORATION AND AUNYX BUSINESS MACHINES CORPORATION V. CANON U.S.A., INC.*, CIVIL ACTION NO. 86-2083-Z, DATED MARCH 19, 1991

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 86-2083-Z

AUNYX CORPORATION and AUNYX BUSINESS MACHINES CORPORATION,

Plaintiffs,

-against-

CANON U.S.A., INCORPORATED,

Defendant.

ORAL DECISION GRANTING DEFENDANT'S MOTION FOR DIRECTED VERDICT
(Trial Transcript, pp. 7-2 to 7-7)
March 19, 1991

Zobel, D.J.

There are before me — I guess there's one motion for a directed verdict. Let me start by pointing out to you what I understand to be the standard in accordance with which I have to decide this motion and, then, as I understand the issues and, then, as I see the evidence concerning those issues.

Appendix B

As I understand it, I must view the evidence in the light most favorable to the plaintiff; and, with respect to the allegation of a conspiracy, whether, so viewed, the plaintiff has presented evidence that tends to exclude the possibility that Canon acted independently.

And as I see the case, there are essentially two issues, one — well, whether under that standard, the plaintiff has adduced sufficient evidence to show, one, a horizontal conspiracy or agreement and, two, antitrust injury. Obviously, he also has to show injury to himself, but that was never that much in contention.

With respect to the first — and let me also interject here, that as I see the plaintiff's case, it does not include the testimony of Mr. King and Mr. Meola, the other gentleman; however, even considering that, I would come to the same conclusion.

With respect to the first issue, that of a horizontal conspiracy or agreement, the parties agreed, as I understood it, that to take the 1983 agreement and 1985 limit out of being a vertical arrangement, the plaintiff has to show that Canon dealers coerced it into — coerced Canon into the contract and limitation; that these restrictions had no legitimate business purpose. Although I note in the plaintiff's request for instructions that they seem now to suggest otherwise, but I thought there was agreement on that. In any event, whether there is or there is not agreement, that is the law as I understand it.

I thought it was also agreed that coercion is different in both kind and degree from requesting and urging. Now, the evidence concerning coercion is extremely thin, and I recall no evidence that would exclude the possibility that Canon acted unilaterally. Nevertheless, were I persuaded that the evidence of antitrust injury

were sufficient, I would deny the motion if this were the only question; that is, it seems to me there is probably enough to go to the jury on the question of a horizontal conspiracy.

With respect to the second element, the antitrust injury, as I understand the plaintiff's position, it is that proof of a horizontal conspiracy is, per se, proof of a violation of Section 1 of the Sherman Act; and, further, that implicit in the finding of horizontal restraint is a finding of anticompetitive effect, that is, of a restriction of output and of the raising of prices.

Therefore, as I understand the argument, if the plaintiff also shows that it has as a result of this conspiracy, this per se violation, suffered an injury to its business or property it has suffered antitrust injury. That, I think, is the argument the plaintiff is making.

Now, first, however vital Topco may still be, in light of Palmer against BRG of Georgia, it is not clear that the per se rule of Topco can be so simply transferred to a situation like this, which seems to me to be akin to what Judge Bork, in Rothery Storage and Van Company, called, "an ancillary horizontal restraint, one that is part of an intergration [sic] of the economic activities of the parties and appears capable of enhancing the group's efficiency."

Second, as I read Atlantic Richfield, which, admittedly, is different from the reading that the plaintiff gives it in the most recent memo, the Court is clear that the antitrust injury requirement means, and here again I quote from the Supreme Court, "that a plaintiff can recover only if the loss stems from a competition reducing aspect or effect of the defendant's behavior." And "reducing" is underlined in the opinion, "competition-reducing aspect." And that "the need for this showing is at least as

great under the per se rule as under the rule of reason.

Indeed, insofar as the per se rule," the Supreme Court says, "permits the prohibition of efficient practices in the name of simplicity, the need for the antitrust injury requirement is underscored." The Court then quotes Phil Areeda to conclude that "proof of a per se violation and of antitrust injury are distinct matters that must be shown independently."

Although the alleged violation there was a vertical maximum price fixing scheme, the rule applies equally to a horizontal restraint, as the dissent both acknowledges and recognizes.

Third, I do not read Bombardier to say otherwise. Indeed, in distinguishing that case from Brunswick, the First Circuit points out there was, in Brunswick, no proof of anticompetitive behavior by the defendant and no diminution of competition. There was proof of both in Bombardier. As I see it, there was no proof of either in this case. So this is a case more like Brunswick and less like Bombardier.

Now, with this background, I turn to the evidence as I heard it during the last week.

To show antitrust injury, the plaintiff points, first, to evidence that as a result of the limit of 250 cartons per month, they were deprived of profits they otherwise would have made. Leaving aside the question whether that evidence proved that they actually suffered harm or, in the words of Bombardier, only that they suffered defeat of their expectation of profits, the evidence says nothing about any effect on competition.

Appendix B

Plaintiff next relies on Mrs. Langone's testimony, that the persons who would have bought from AUNYX are harmed because they were left to purchase from other dealers at the much higher suggested retail price. But that evidence was admitted solely in the context of the voir dire of Mrs. Langone on her qualifications as an expert on pricing and competition. It cannot now be transformed into evidence to prove the substance of plaintiff's claim, as it is not admissible to prove what other dealers' pricing practices were. That is, if it were offered as to the substance, it is rank hearsay. What other dealers told her is absolute hearsay. And I cite my own Clamp-All case, where I ruled out a similar expert's opinion based on telephone conversations the expert had with other dealers, and the First Circuit affirmed that evidentiary ruling.

Now, in papers filed this morning, the plaintiff points to certain findings of the I.T.C., in particular, Paragraph 153, which states that "the purpose of the market allocation provision for the sale of toner is, inter alia, to reduce competition." It says nothing, however, about the effect of the provision.

Now, I also note that another section that was appended to the memorandum which plaintiff brought to my attention states that "Canon did in fact restrict sales of toner to several dealerships to enforce its market allocation scheme." "Its", not "its dealers." That language appears to undercut plaintiff's assertions of a horizontal arrangement. It does not, in any event, advance that cause on antitrust injury.

I could recall nothing else in the evidence to show any anticompetitive effects of the restriction, and I am constrained, therefore, to allow the motion, even without consideration of any collateral estoppel effect of the findings of I.T.C. That is, in dealing

with this, I did not consider either the evidentiary or collateral estoppel effect of the I.T.C. finding, other than as brought to my attention by the plaintiff.

For these reasons, the motion is allowed. I guess we will not enter judgment until the rest of the case is dealt with. And I would like to, after discharging the jury, talk to counsel about where we go from here.